

Approved for tabling.

~~BAW~~ SNA

5/20/16

REPUBLIC OF KENYA



NATIONAL ASSEMBLY



ELEVENTH PARLIAMENT – FOURTH SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

REPORT ON THE CONSIDERATION OF THE PROCEEDS OF CRIME AND ANTI- MONEY
LAUNDERING (AMENDMENT) BILL, 2015

DIRECTORATE OF COMMITTEE SERVICES
CLERKS CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

OCTOBER, 2016

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ABBREVIATIONS

- FRC - Financial Reporting Centre
- FATF - Financial Action Task Force
- ICRG - International Cooperation Revenue Group
- FIU - Financial Intelligence Unit
- POCAMLA - Proceeds of Crime and Anti- Money Laundering Act

CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings of the consideration of the Proceeds of Crime Anti-Laundering (Amendment) Bill, 2015 which was committed to the Committee on 16th December, 2015 pursuant to Standing Order 127.

The principal object of the Proceeds of Crime and Anti- Money Laundering (amendment) Bill, 2015 is to amend the Proceeds of Crime and Anti- Money laundering Act, Cap. 59B to enhance the powers of the Financial Reporting Centre to impose civil penalties and take administrative action against non-compliance with the directives of the Centre.

The Bill further seeks to enhance the operational independence of the Centre by removing any possibility of conflict of interest. The operational independence of the Bill is also enhanced by the fact that the Bill also removes the Centre from the ambit of the State Corporations Act in terms of appointment of the member of its staff. The Bill also seeks to clarify the advisory nature of the Anti-Money Laundering Board which includes advising the Cabinet Secretary on the policies, best practices and related activities to identify proceeds of crime or proceeds of unlawful activities conferred to the Cabinet Secretary under the Act.

On behalf of the Departmental Committee on Finance, Planning & Trade and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Proceeds of Crime and Anti- Money Laundering (amendment) Bill, 2015.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank the National Treasury for their participation in scrutinizing the Bill.

Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

HON. BENJAMIN LANGAT, MP

EXECUTIVE SUMMARY

The Proceeds of Crime and Anti- Money Laundering (amendment) Bill, 2015 was introduced in the National Assembly by the Leader of the majority Party, National Assembly on 16th December, 2015 and therefore committed to the Departmental Committee on Finance, Planning & Trade for consideration in line with the Standing Order 127. The Committee engaged the Financial Reporting Centre, Anjarwalla & Khanna and the National Treasury whose views are contained in this report.

The Proceeds of Crime and Anti- Money Laundering (amendment) Bill, contains a total of 18 clauses which proposes to amend various Sections of the Principal Act in order to seal some legislative gaps cited in the law and align them with the Constitution.

The bill in sub-clause 4 proposes to empower the Financial Reporting Centre to impose civil penalties, on conviction, for non-compliance with any instruction, direction or rules issued by the Centre under Section 24A of the Act. This will enhance compliance thereby making the regulatory role of the Centre more effective. The penalties levels are in tandem with the penalties enshrined in sections 16 of the principal Act.

In sub-clause 4 of the bill, the proposed new insertion of Section 24B (4) provides for a legal procedure through a court of competent jurisdiction in recovering an imposed fine (any time when the fine/debt becomes due) for non-compliance. However, there is no provision for a fair hearing before the actions are taken.

In addition to the change of title, as the Chief Executive Officer, the responsibilities and duties are more clarified and the need for direction from the Minister is expunged. This therefore bestows independence to the CEO in execution of his responsibilities.

The proposed amendment in Section 25 of the Act provides more powers to the Cabinet Secretary to determine the terms and conditions of the aforementioned two Office holders with the consultation of the Board. In the principal Act, the board was solely responsible for setting the terms and conditions. There is no mention of Salary Remuneration Commission (SRC). These terms and conditions should remain with the board but with consultations with SRC.

The proposed new insertion of Section 24C though has noble intention of enhancing suitability and competence both for individuals and reporting institutions, the reasons for taking actions espoused in sub-section (c) and (d) should be stipulated clearly either in regulations or in the bill for objectivity and ward off any likelihood of abuse.

1.0. MANDATE OF THE COMMITTEE

The Committee on Finance, planning & Trade is one of the Departmental Committees of the National Assembly established under Standing Order 216 and mandated:

- (a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (b) To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation.
- (c) To study and review all legislation referred to it.;
- (d) To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary and as may be referred to them by the House;
- (f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*); and
- (g) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

1.1. COMMITTEE MEMBERSHIP

Chairman	The Hon. Benjamin Langat, MP
Vice Chairman	The Hon. Nelson Gaichuhie, MP
Members	The Hon. Dr. Oburu Oginga, MP
	The Hon. Jimmy Nuru Angwenyi, MP
	The Hon. Eng. Shadrack Manga, MP
	The Hon. Ahmed Shakeel Shabbir Ahmed, MP
	The Hon. Sammy Koech, MP
	The Hon. Sammy Mwaita, MP
	The Hon. Tiras N. Ngahu, MP
	The Hon. Abdikadir Ore Ahmed, MP
	The Hon. Abdullswamad Sheriff, MP
	The Hon. Abdul Rahim Dawood, MP
	The Hon. Alfred W. Sambu, MP
	The Hon. Anyanga Andrew Toboso, MP
	The Hon. Daniel E. Nanok, MP
	The Hon. Dennis Waweru, MP
	The Hon. Joash Olum, MP
	The Hon. Iringo Cyprian Kubai, MP
	The Hon. Jones M Mlolwa, MP
	The Hon. Joseph Limo, MP
	The Hon. Kirwa Stephen Bitok, MP
	The Hon. Lati Lelelit, MP
	The Hon. Mary Emase, MP
	The Hon. Ogendo Rose Nyamunga, MP
	The Hon. Patrick Makau King'ola, MP
	The Hon. Ronald Tonui, MP
	The Hon. Sakaja Johnson, MP
	The Hon. Sakwa John Bunyasi, MP
	The Hon. Sumra Irshadali, MP

1.2. COMMITTEE SECRETARIAT

First Clerk Assistant	Evans Oanda
Third Clerk Assistant	Nicodemus Maluki
Third Clerk Assistant	Fredrick Otieno
Legal Counsel II	Brigita Mati
Legal Counsel II	Emma Essendi
Research Officer III	Eric Ososi
Research Officer III	Sharon Rotino

1.3. CONSIDERATION OF THE BILL

The Proceeds of Crime and Anti- Money Laundering (amendment) Bill, 2015 was published on 11th June 2015 and read a First Time on 16th December , 2015 and thereafter committed to the departmental Committee on Finance, Planning & Trade for consideration pursuant to Standing Order 127.

In processing the Bill, the Committee invited comments from the public by placing advertisements in the Daily Nation and Standard newspapers on 26th January, 2016 pursuant to Article 118 of the Constitution.

2.0. BACKGROUND INFORMATION

The Proceeds of Crime and Anti - Money laundering Act, cap 59 was enacted in December 2009 and came into effect on 28th June, 2010. The Act is the Country's Principal Legal Regime for combating money laundering and accordingly provides a comprehensive framework for dealing with the vice. It also establishes the Financial Reporting Centre and the Anti- Money laundering Advisory Board amongst others.

The principal object of the Proceeds of Crime and Anti- Money Laundering (amendment) Bill, 2015 is to amend the Proceeds of Crime and Anti- Money laundering Act, Cap. 59B to enhance the powers of the Financial Reporting Centre to impose civil penalties and take administrative action against non-compliance with the directives of the Centre.

The Bill further seeks to enhance the operational independence of the Centre by removing any possibility of conflict of interest. The operational independence of the Bill is also enhanced by the fact that the Bill also removes the Centre from the ambit of the State Corporations Act in terms of appointment of the member of its staff. The Bill also seeks to clarify the advisory nature of the Anti-Money Laundering Board which includes advising the Cabinet Secretary on the policies, best practices and related activities to identify proceeds of crime or proceeds of unlawful activities conferred to the Cabinet Secretary under the Act.

2.1 CLAUSE BY CLAUSE ANALYSIS OF THE BILL

Clause 1

Gives the Short title

Clause 2

Provides for Amendment of Section 2 by substituting the definition of the word 'Director' with Director-General

Clause 3

Substituting the word 'Director' with Director-General

Clause 4

Provides the powers of the Centre to impose civil penalties for non-compliance and to take administrative action to recover imposed fines

Clause 5

Empowers the Cabinet Secretary to a greater extent determine the terms and conditions of service of Director General and Deputy

Clause 6, 7, 8, 9 and 10

Substituting the word 'Director' with Director-General

Clause 11

Removes the role of State Corporations Advisory Committee in approval of terms and conditions of the Centre

Clause 12, 13,14,15,16.17

Substituting the word 'Director' with Director-General

Clause 18

Provides for the functions of the Board

2.2. SUBMISSIONS FROM THE STAKEHOLDERS

The Committee received submissions from the stakeholders on the Bill as follows:

2.2.1. FINANCIAL REPORTING CENTRE

The following is a summary of the issues raised by Financial Reporting Centre on the Proceeds of Crime and Anti- Money Laundering (amendment) Bill, 2015 .

Clause 2 - Definitions

Proposed: adding the Word “General” between the words “Director” wherever it appears.

Justification: The need to enhance the Office of the Director by renaming it to “Director General”. The various Heads of the functions at the Centre will henceforth be referred to as “Director”

Clause 4 of the Bill be amended in Section 24 B and 24C

Justification

There is need to enhance the powers of the Centre to impose civil penalties for noncompliance with FRC’s instructions or directives. The amendments as they appear in the Bill are criminal in nature requiring person to be first convicted before the imposition of a fine which was not the intention as the proposed penalties were to be non- conviction based

Clause 8(section 28) – to delete paragraph (c) and substitute with a new paragraph

Justification

This clarifies that the director – General is responsible for all decisions of the Centre which is in line with the Financial Action Task Force (FATF) Requirements and international best practices where the Centre is required to be operationally independent

Clause 11 (Section 31) – Insertion of new words “specific act or” immediately before the word “function”

Justification

This amendment seeks to remove the role of state corporations Act over the operations of the Centre as this has the potential to interfere with the operational independence of the Centre which is a key requirement and best practices for financial intelligence units. The cabinet secretary however retains the role of approving the general terms and conditions of the Centre's staff.

2.2.2. ANJARWALLA & KHANNA

The following is a summary of the issues raised by the Anjarwalla & Khanna on the Proceeds of Crime and Anti- Money Laundering (amendment) Bill, 2015

Clause 24 B sub sections 2 amended by extending the period of notice from seven days to fourteen days with a right to apply for further extension at the discretion of the FRC

ALN. Proposes further amendment to afford fair hearing to a reporting institution before issuing sanction

Justification: The proposed penalties are serious and significant hence the need for extension in filing the notice to show cause response

Proposed: Amend subsection (2) by extending the period of notice from seven days to fourteen days with a right to apply for further extension at the discretion of the FRC.

Justification: The proposed penalties are serious and significant hence the need for extension in filing the notice to show cause response.

Clause 5(section 25) - proposed rejection of the amendment

Justification: this amendment will give the executive the executive control over FRC. The independence of the FRC will be compromised and effectively place the battle against anti- money laundering in the hands of the executive rather than independent body.

3.0. COMMITTEE OBSERVATIONS

The following are some of the key observations from the proposed amendments to this Bill.

i) Imposition of civil penalties

The bill in sub-clause 4 proposes to empower the Financial Reporting Centre to impose civil penalties, on conviction, for non-compliance with any instruction, direction or rules issued by the Centre under Section 24A of the Act. This will enhance compliance thereby making the regulatory role of the Centre more effective. The penalties levels are in tandem with the penalties enshrined in sections 16 of the principal Act.

ii) Administrative action by the Centre to enforce payment of fine

In sub-clause 4 of the bill, the proposed new insertion of Section 24B (4) provides for a legal procedure through a court of competent jurisdiction in recovering an imposed fine (any time when the fine/debt becomes due) for non-compliance.

iii) Replacement of the word Director with Director General (Clauses 5-10 and 12-17): Despite the change of title, as the Chief Executive Officer, the responsibilities and duties remain the same. Normal Organizational structure has many Directors under a Director General. The title of Deputy Director remains the same whereas if there are no implied Directors, then it would be advisable if this was changed to be Deputy Director General.

iv) Terms and Conditions of Service for the Director and Deputy Director (Clause 5)

The proposed amendment in Section 25 of the Act provides more powers to the Cabinet Secretary to determine the terms and conditions of the aforementioned two Office holders with the consultation of the Board. In the principal Act, the board was solely responsible for setting the terms and conditions. There is no mention of Salary Remuneration Commission (SRC) whose mandate as enshrined in Article 230(5) of the Constitution is advice on remuneration and salaries of public officers.

v) Replacing State Corporations Advisory Committee with the Cabinet Secretary in approving the general terms and conditions of the Centre in terms of appointment of staff

Proposed amendment of Section 31): Though this will enhance the operational independence by removing the center from the ambit of State Corporations Act, there is need to seek advice from Salary Remuneration Commission (SRC) to comply with Article 230 of the Constitution

vi) Powers of the Centre to issue order barring an individual from employment within reporting institution and order requesting suspension or revocation of a license or registration of specified reporting institution

The proposed new insertion of Section 24C though has noble intention of enhancing suitability and competence both for individuals and reporting institutions, the reasons for taking actions espoused in

sub-section (c) and (d) should be stipulated clearly either in regulations or in the bill for objectivity and ward off any likelihood of abuse.

4.0. COMMITTEE RECOMMENDATIONS

Having considered the proposed amendments by the stakeholders to the Bill the Committee adopted its amendments as follows:-

1. Clause 4

That clause 4 of the Bill be amended in the proposed section 24B—

(a) in subsection (1)—

- (i) by deleting the words “on conviction to a fine” and substituting therefor the words “to a monetary penalty” in the proposed paragraphs (a) and (b);
- (ii) by deleting the words “on conviction to an additional fine” and substituting therefor the words “to an additional monetary penalty in the proposed paragraph (c);

(b) in subsection (2)—

- (i) by deleting the word “fine” appearing immediately after the words “before imposing a” and substituting therefor the words “monetary penalty”;
- (ii) by deleting the words “seven days” and replacing therefor with the words “forteen days”
- (iii) by deleting the word “fines” appearing immediately after the word “prescribed” and substituting therefor the words “monetary penalty”;

(c) in subsection (3)—

- (i) by deleting the word “fine” appearing immediately before the words “is prescribed under” and substituting therefor the words “monetary penalty”;
- (ii) by deleting the word “fine” appearing immediately after the expression “section, such” and substituting therefor the word “penalty”;
- (iii) by deleting the word “ten” in paragraph (b);
- (iv) by deleting the word “fine” appearing in paragraph (c) and substituting therefor the words “monetary penalty”;

(d) by deleting subsection (4) and substituting therefor the following new subsection (4)—

(4) A monetary policy imposed on a person under this section shall be a debt due to the centre and shall, after it becomes due be recoverable at any through proceedings in a court of competent jurisdiction in the name of the centre.

Justification

This proposal emanated from the FRC. In the original submissions made by the FRC in December 2015, FRC had proposed the introduction of Civil Monetary Penalties into the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA) as a means of further enhancing the FRC’s powers to take action against persons found to be non-compliant with the provisions of POCAMLA. The ability by the Financial Intelligence Unit (in this case the FRC) to

take proportionate and dissuasive sanctions against non-complaint institutions and persons is one of the requirements of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation as set out by the Financial Action Task Force (FATF).

When the Proceeds of Crime and Anti-Money Laundering Bill, 2015 was however published, the sanctions were crafted as criminal sanctions requiring the conviction of an accused person . This was not the intention of the original proposal and the proposed amendments therefore seek to revert the amendments as contained in the Bill to civil monetary penalties as originally proposed.

The proposed penalties are serious and significant hence the need for extension of time from 7 days to 14 days in filing the notice to show cause response under clause 4(2).

2. Clause 4 of the Bill is amended in the proposed section 24C by—
- (a) inserting the word “or” immediately after the word “institution” appearing in paragraph (a);
 - (b) inserting the words “instruction or” immediately before the word “direction” appearing in paragraph (b);
 - (c) inserting the words “or individuals” immediately after the word “individual” appearing in paragraph (c);
 - (d) deleting paragraph (d) and substituting therefor the following new paragraph –
“(d) issue an order to a competent supervisory authority requesting the suspension or revocation of a licence, registration, permit or authorization of a specified reporting institution whether entirely or in a specified capacity or of any director, principal, officer, agent or employee of the reporting institution.

Justification

It seeks to enhance the FRC’s ability to take administrative action against persons for non-compliance with the provisions of POCAMLA. This proposal is also in line with international best practices requiring FIUs to be able to take proportional and dissuasive sanctions for non-compliance. When the FRC recently began taking actions against reporting institutions for non-compliance with POCAMLA, it was noted that the Act did not vest on the FRC sufficient powers to take action against errant persons. There is therefore need to enhance the powers of the FRC to enable it to take civil and administrative action against non-compliant persons and institutions. The FRC has benchmarked with other FIUs in the region and beyond and notes that these FIUs are clothed with these powers.

However, when the Amendment Bill was published, certain elements of the administrative sanctions were omitted. The proposed amendments therefore seek to revert the amendments in the Bill to the form in which they were originally proposed by the FRC.

Insertion of New clause 24C

“(2) Before taking administrative action imposed against any person or reporting institution under this section, the Centre shall give the person or reporting institution a written notice of not less than fourteen days’ requiring the person or institution to show cause as to why the prescribed administrative action should not be taken.

Justification

The requirement for a written notice affords a fair hearing to the concerned person or reporting institution. The sanctions imposed are of a serious nature. However, there appears to be no provision for conducting a hearing with the reporting institution before imposing sanctions. This may be seen to be a breach of the right to natural justice and could result in administrative action against the FRC.

Clause 8

That clause 8 be amended by deleting paragraph (c) and substituting therefor the following—

“(c) taking all decisions of the Centre in the exercise, discharge and performance of the Centre’s objectives, powers, functions and duties”.

Justification

This clarifies that the Director-General is responsible for all decisions made by the Centre. This is in line with the Financial Action Task Force (FATF) requirements and international best practice which require that the Centre must be vested with operational independence.

Clause 11

That clause 11 be amended in section 31 by inserting the words “specific act or” immediately before the word “function” appearing in subsection (3).

Justification

- (a) The amendment seeks to exclude the centre from the ambit of the State Corporations Act as this has the potential to interfere with the operational independence of the centre which is a key requirement and best practice for financial intelligence units;
- (b) The Cabinet Secretary, however, retains the role of approving the general terms and conditions of the Centre’s staff.

SIGNED.....DATE.....*21st Oct 2016*.....

THE HON. NELSON GAICHUHIE, MP

VICE CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE

ANNEXES

ANNEX 1: MINUTES

MINUTES OF THE 2ND SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON TUESDAY 26TH JANUARY, 2016 IN CONTINENTAL HOUSE, COMMITTEE ROOM, 5TH FLOOR, PARLIAMENT BUILDINGS AT 10:00AM

PRESENT

- | | |
|----------------------------------|--------------------|
| 1. Hon. Benjamin Langat, MP | Chairperson |
| 2. Hon. Jimmy Nuru Angwenyi, MP | |
| 3. Hon. Shakeel Shabbir, MP | |
| 4. Hon. Sammy Mwaita, MP | |
| 5. Hon. Ronald Tonui, MP | |
| 6. Hon. Mary Emase, MP | |
| 7. Hon. Dr. Oburu Oginga, MP | |
| 8. Hon. Lati Lelelit, MP | |
| 9. Hon. Ogendo Rose Nyamunga, MP | |
| 10. Hon. Jones Mlolwa, MP | |

ABSENT WITH APOLOGIES

- | | |
|-------------------------------------|-------------------------|
| 1. Hon. Nelson Gaichuhie, MP | Vice-Chairperson |
| 2. Hon. Eng. Shadrack Manga, MP | |
| 3. Hon. Anyanga Andrew Toboso, MP | |
| 4. Hon. Sakwa John Bunyasi, MP | |
| 5. Hon. Timothy Bosire, MP | |
| 6. Hon. Dennis Waweru, MP | |
| 7. Hon. Kubai Iringo, MP | |
| 8. Hon. Daniel Epuyo Nanok, MP | |
| 9. Hon. Alfred Sambu, MP | |
| 10. Hon. Sammy Koech, MP | |
| 11. Hon. Tiras Ngahu, MP | |
| 12. Hon. Abdul Rahim Dawood, MP | |
| 13. Hon. Joash Olum, MP | |
| 14. Hon. Sumra Irshadali, MP | |
| 15. Hon. Patrick Makau King'ola, MP | |
| 16. Hon. Joseph Limo, MP | |
| 17. Hon. Sakaja Johnson, MP | |
| 18. Hon. Kirwa Stephen Bitok, MP | |
| 19. Hon. Abdullswamad Shariff, MP | |

IN ATTENDANCE

- | | | |
|-------------------------|---|-----------------------|
| 1. Mr. Robert Nyaga | - | Chief Fiscal Analyst |
| 2. Mr. Nicodemus Maluki | - | Third Clerk Assistant |

- | | | |
|--------------------------|---|-----------------------|
| 3. Mr. Fredrick Otieno | - | Third Clerk Assistant |
| 4. Ms. Anncettah Gacheri | - | Research Officer |
| 5. Mr. Eric Ososi | - | Research Officer |
| 6. Mr. Thomas Ogwel | - | Fiscal Analyst |
| 7. Mr. Erick Kanyi | - | Fiscal Analyst |

MIN.NO. DCF/005/2016: PRELIMINARIES

The Chairperson called the meeting to order at 10:30am followed by a word of prayer.

MIN.NO. DCF/006/2016: CONSIDERATION OF THE PROCEEDS OF CRIME AND ANTI- MONEY LAUNDERING (AMENDMENT) BILL, 2015

The Parliamentary Budget Office informed the Committee as follows regarding the Bill:-

- The bill seeks to amend the Proceeds of Crime and Anti- Money Laundering Act (Cap. 59B) to enhance its operational efficiency, its effectiveness and the independence of the Financial Reporting Centre.

KEY OBSERVATIONS

- i. The bill proposes to enhance the powers of the Financial Reporting Centre to impose civil penalties and to take administrative action to recover the debt arising from such fines (Clauses 4).
- ii. The bill seeks to enhance the operational independence by removing the Financial Reporting Centre from the ambit of the State Corporations Acts in terms of appointment of members of its staff(Clause 11)
- iii. The bill seeks to clarify the advisory nature of the Anti-Money Laundering Board(Clause 18)
- iv. The bill proposes to change the name of the Chief Executive Officer from Director to Director General though the responsibilities and duties remain unchanged.

ANALYSIS OF PERTINENT ISSUES

- a. **Imposition of civil penalties:** The bill in sub-clause 4 proposes to empower the Financial Reporting Centre to impose civil penalties, on conviction, for non-compliance with any instruction, direction or rules issued by the Centre under Section 24A of the Act. This will enhance compliance thereby making the regulatory role of the Centre more effective. The penalties levels are in tandem with the penalties enshrined in sections 16 of the principal Act.
- b. **Administrative action by the Centre to enforce payment of fine:** In sub-clause 4 of the bill, the proposed new insertion of Section 24B (4) provides for a legal procedure through a court of competent jurisdiction in recovering an imposed fine (any time when the fine/debt becomes due) for non-compliance.

- c. **Replacement of the word Director with Director General (Clauses 5-10 and 12-17):** Despite the change of title, as the Chief Executive Officer, the responsibilities and duties remain the same. Normal Organizational structure has many Directors under a Director General. The title of Deputy Director remains the same whereas if there are no implied Directors, then it would be advisable if this was changed to be Deputy Director General.
- d. **Terms and Conditions of Service for the Director and Deputy Director (Clause 5):** The proposed amendment in Section 25 of the Act provides more powers to the Cabinet Secretary to determine the terms and conditions of the aforementioned two Office holders with the consultation of the Board. In the principal Act, the board was solely responsible for setting the terms and conditions. There is no mention of Salary Remuneration Commission (SRC).
- e. **Replacing State Corporations Advisory Committee with the Cabinet Secretary in approving the general terms and conditions of the Centre in terms of appointment of staff:** (Proposed amendment of Section 31): Though this will enhance the operational independence by removing the center from the ambit of State Corporations Act, there is need to seek advice from Salary Remuneration Commission (SRC) to comply with Article 230 of the Constitution.
- f. **Powers of the Centre to issue order barring an individual from employment within reporting institution and order requesting suspension or revocation of a license or registration of specified reporting institution:** The proposed new insertion of Section 24C though has noble intention of enhancing suitability and competence both for individuals and reporting institutions, the reasons for taking actions espoused in sub-section (c) and (d) should be stipulated clearly either in regulations or in the bill for objectivity and ward off any likelihood of abuse

I. POLICY OPTIONS

Table 2: policy options for consideration by the Committee	
Options	Likely Impact
Pass the Bill as Published	There will reduce/ eradicate the incidences of Money Laundering and chances of concealing proceeds from crime
Reject the Bill	The status quo remains
Pass the Bill with amendments	The Committee may pass the Bill with amendments.

**MINUTES OF THE 77TH SITTING OF THE DEPARTMENTAL
COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON SATURDAY
24TH SEPTEMBER, 2016 IN THE CONFERENCE ROOM, 3RD FLOOR,
PINECONE HOTEL, KISUMU AT 10.00AM**

PRESENT

- | | |
|-----------------------------------|-------------------------|
| 1. Hon. Benjamin Langat, MP | Chairperson |
| 2. Hon. Nelson Gaichuhie, MP | Vice-Chairperson |
| 3. Hon. Jimmy Nuru Angwenyi, MP | |
| 4. Hon. Shakeel Shabbir, MP | |
| 5. Hon. Abdul Rahim Dawood ,MP | |
| 6. Hon. Anyanga Andrew Toboso, MP | |
| 7. Hon. Daniel Epuyo Nanok, MP | |
| 8. Hon. Iringo Cyprian Kubai, MP | |
| 9. Hon. Joash Olum, MP | |
| 10. Hon. Jones Mlolwa, MP | |
| 11. Hon. Joseph Limo, MP | |
| 12. Hon. Kirwa Stephen Bitok, MP | |
| 13. Hon. Lati Lelelit, MP | |
| 14. Hon. Mary Emase, MP | |
| 15. Hon. Ogendo Rose Nyamunga, MP | |
| 16. Hon. Ronald Tonui, MP | |

APOLOGIES

1. Hon. Dr. Oburu Oginga, MP
2. Hon. Eng. Shadrack Manga, MP
3. Hon. Sammy Koech, MP
4. Hon. Alfred Sambu, MP
5. Hon. Abdikadir Ore Mohammed, MP
6. Hon. Abdullswamad Shariff, MP
7. Hon. Dennis Waweru, MP
8. Hon. Patrick Makau King'ola, MP
9. Hon. Sakaja Johnson, MP
10. Hon. Sakwa John Bunyasi, MP
11. Hon. Sammy Mwaita, MP
12. Hon. Sumra Irshadali, MP
13. Hon. Tiras Ngahu, MP

COMMITTEE SECRETARIAT

- | | | |
|---------------------|---|------------------|
| 1. Evans Oanda | - | Clerk Assisstant |
| 2. Fredrick otieno | - | Clerk Assistant |
| 3. Nicodemus Maluki | - | Clerk Assistant |
| 4. Benson Nzofu | - | Clerk Assistant |
| 5. Peter Mwaura | - | Legal Counsel |

- 6. Adams Onyanyo - Sergeant Art Arms
- 7. Sharon Cheronno - Research Officer
- 8. Eric Ososi - Research Officer
- 9. Josephat Motonu - Fiscal Analyst
- 10. Robert Nyaga - Fiscal Analyst

THE NATIONAL TREASURY

- 1. Henry Rotich - Cabinet Secretary for the National Treasury
- 2. Donald Murgor - PA to the CS
- 3. Solomon Kitungu - CEO of the Privatization Commission
- 4. Stephen Wangombe - CEO, Competition Authority
- 5. Alexia Waweru - Legal Officer, Competition Authority
- 6. Jackline Muindi - Legal Officer, Privatization Commission
- 7. Sammy Mukobe - Commissioner, IRA
- 8. Elias Omondi - Insurance Regulatory Authority
- 9. Jemimah Mwaniki - Insurance Regulatory Authority
- 10. Ronoh Tuimising, PHD - PPP Unit

MIN.NO. DCF/283 /2016: PRELIMINARIES

The ViceChairperson called the meeting to order at 10. 00am and prayed.

MIN.NO. DCF/284/2016: CONSIDERATION OF BILLS BEFORE THE COMMITTEE

A. The privatization (Amendment) Bill, 2016

The Cabinet Secretary, with the help of the officers from the privatization Commission informed the Committee as follows regarding the Bill:

- 1. The proposed amendments are geared towards hastening the privatization process by introducing a tribunal that will be hearing cases on privatization, and also removing parliamentary approval of commissioners during appointment.
- 2. The CS proposed the following further amendments:

Section	Current provision	Amended provision	Rationale for amendment
	“privatization” means a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation;	“privatization “ means a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation but excludes sale of new shares to existing	To clarify that sale of new shares through a rights issue is not a privatization as defined under the Act. To clarify the position on rights issue in view of provisions under the

Section	Current provision	Amended provision	Rationale for amendment
		shareholders through a rights issue or any balance sheet reorganization which may lead to dilution of the percentage of shares held by a public entity	<p>Companies Act and related laws with respect to which inclusion of rights issue under privatization would have no force.</p> <p>To clarify and encourage the use of rights issue as a source of financing for enterprises requiring urgent injection of financial resources.</p>
Section 37	The Second Schedule shall apply with respect to objections and appeals relating to what has been determined, as published under section 36.	The Second Schedule shall apply with respect to objections and appeals relating to what has been determined and published under section 36 and any other objections and appeals relating to implementation of the privatization programme.	To broaden the mandate of the Privatization Appeals Tribunal to include other objections and appeals to preempt lengthy court processes.
Second Schedule	<p>Paragraph 2(1):</p> <p>A person may file, with Commission, an objection to what has been determined, as published under section 36.</p> <p>Paragraph 2 (2)</p> <p>An objection may not be filed later than five working days after the publication under section 36.</p>	<p>Paragraph 2(1):</p> <p>A person may file, with Commission, an objection to what has been determined and published under section 36 or any other objection relating to implementation of the privatization programme.</p> <p>Paragraph 2 (2)</p> <p>An objection to what has been determined and published under section 36 may not be filed later than five working days after the publication.</p> <p>Paragraph 2(3):</p>	<p>To broaden the mandate of the Privatization Appeals Tribunal to include other objections and appeals to preempt lengthy court processes.</p>

Section	Current provision	Amended provision	Rationale for amendment
	<p>Paragraph 2(3):</p> <p>The Commission shall make a decision with the respect to the objection and give a copy of its decision to the objector within five working days after receiving the objection.</p>	<p>The Commission shall make a decision with the respect to the objection to what has been determined and published under section 36 or any other objection relating to implementation of the privatization programme and give a copy of its decision to the objector within five working days after receiving the objection.</p>	
First Schedule	<p>Paragraph 3:</p> <p>A member described in section 5(1) may designate a representative to attend a meeting of the Commission or of a committee of the Commission in the member's absence.</p>	<p>Paragraph 3:</p> <p>A member described in section 5(1) (b) and (c) may designate a representative to attend a meeting of the Commission or of a committee of the Commission in the member's absence.</p>	<p>To correct an earlier error in the Act. Allows the Attorney General and CS National Treasury to appoint alternate directors to represent them in the Commission's board.</p>

The Committee agreed to all the proposed amendments. The Committee however noted that contrary to the assertion by the CS that parliament was responsible for delaying privatization process by not approving commissioners for appointment in time, the approval process is provided in law with clear timelines. Parliament has always adhered to the provided timelines.

B. The Competition (Amendment) Bill, 2016

After considering the proposed consolidated amendments to the Competition (Amendment) Bill, 2016 and their comments from the National Treasury, the following amendments were adopted:

1. Clause 2 be amended by deleting the definition of “undertaking and replacing therfor with the following definition: *“undertaking” be re-worded to read as follows, ‘undertaking means any business intended to be carried on, or carried on, for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a Trade Association.*’
2. *Clause 10*

The power to set the threshold for a merger should remain within the powers of the Cabinet Secretary and it should be done in consultation with the Competition Authority as opposed to the proposal in the Bill to vest this power with the Competition Authority.

3. New proposal to amend section 48

Appeals to the Tribunal

Amend section 48 to allow a party to appeal once notified rather than waiting for the Gazette Notice given the delays experienced in waiting for the Notice

Section 48 provides that "not later than thirty days after notice is given by the Competition Authority in the Gazette in terms of the determination made by the Competition Authority in relation to a proposed merger, a party to the merger may apply to the Tribunal, in the form determined by the Tribunal, for review of the Competition Authority's decision;

once parties receive a written decision from the Authority, they should have the right to file an Appeal to the Tribunal. This is because there is often a significant time lag between the Authority issuing their written decision and the publication of the same in the Gazette

C. The Insurance (Amendment) Bill, 2016

After considering the proposed consolidated amendments to the Insurance (Amendment) Bill, 2016, the following amendments were adopted:

1. Clause 11 should be deleted.

Justification

It is good to retain ninety days. The proposed amendment does not take into account the practical issues which tend to arise when an insurer is handling a claim as some investigations involve many parties and take over thirty days to complete. If claims are settled hurriedly, it will encourage fraudulent claims and possible collapse of several underwriters, hence the need for caution to be exercised to ensure only genuine claims are settled.

The Committee held this clause in abeyance – for further discussion

2. The proposed section 19A be amended in subsection (1) by deleting the following words "**except where the person is exempted in accordance with this Act**".

Justification

Section 181 of the Insurance Act gives the Cabinet Secretary power to exempt any person from the provision of the Insurance Act. The exemption

contemplated under the proposed section is well taken care of under Section 181 and there may be no need for this repetition which may create an impression that the exemption is peculiar to *takaful*.

This is to give the correct meaning to the paragraph so as to allow the type of capital authorized for a new company as ordinary shares and preference shares which are irredeemable and non-cumulative in nature.

D. The Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2015

After considering the proposed consolidated amendments to the Proceeds of Crime and Anti- Money Laundering (Amendment) Bill, 2016, the following amendments were adopted:

Clause 4

1. Clause 4 of the Bill is amended in the proposed section 24B –
 - (a) in subsection (1) –
 - (i) by deleting the words “on conviction to a fine” and substituting therefor the words “to a monetary penalty” in the proposed paragraphs (a) and (b);
 - (ii) by deleting the words “on conviction to an additional fine” and substituting therefor the words “to an additional monetary penalty in the proposed paragraph (c);
 - (b) in subsection (2) –
 - (i) by deleting the word “fine” appearing immediately after the words “before imposing a” and substituting therefor the words “monetary penalty”;
 - (ii) by deleting the words “seven days” and replacing therefor with the words “forteen days”
 - (iii) by deleting the word “fines” appearing immediately after the word “prescribed” and substituting therefor the words “monetary penalty”;
 - (c) in subsection (3) –
 - (i) by deleting the word “fine” in the opening statement where it first appears and substituting therefor the words “monetary penalty”;
 - (ii) by deleting the word “fine” in the opening statement where it second appears and substituting therefor the word “penalty”;
 - (iii) by deleting the word “ten” in paragraph (b);
 - (iv) by deleting the word “fine” and substituting therefor the words “monetary penalty” in paragraph (c);
 - (d) in subsection (4) –
 - (i) by deleting the word “fine” and substituting therefor the words “monetary penalty”;
 - (ii) by inserting the words “by proceedings in the name of the Centre” immediately after the word “jurisdiction”.

Justification

This proposal emanated from the FRC. In the original submissions made by the FRC in December 2015, FRC had proposed the introduction of Civil Monetary Penalties into the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAML) as a means of further enhancing the FRC's powers to take action against persons found to be non-compliant with the provisions of POCAML. The ability by the Financial Intelligence Unit (in this case the FRC) to take proportionate and dissuasive sanctions against non-complaint institutions and persons is one of the requirements of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation as set out by the Financial Action Task Force (FATF).

When the Proceeds of Crime and Anti-Money Laundering Bill, 2015 was however published, the sanctions were crafted as criminal sanctions requiring one to be first convicted. This was not the intention of the original proposal and the proposed amendments therefore seek to revert the amendments as contained in the Bill to civil monetary penalties as originally proposed.

The proposed penalties are serious and significant hence the need for extension of time from 7 days to 14 days in filing the notice to show cause response under clause 4(2).

2. Clause 4 of the Bill is amended in the proposed section 24C –
 - (a) inserting the word “or” immediately after the word “institution” in paragraph (a);
 - (b) inserting the words “instruction or” immediately before the word “direction in paragraph (b);
 - (c) inserting the words “or individuals” immediately after the word “individual” in paragraph (c);
 - (d) deleting paragraph (d) and substituting therefor the following new paragraph –

“(d) issue an order to a competent supervisory authority requesting the suspension or revocation of a licence, registration, permit or authorization of a specified reporting institution whether entirely or in a specified capacity or of any director, principal, officer, agent or employee of the reporting institution

Justification

It seeks to enhance the FRC's ability to take administrative action against persons for non-compliance with the provisions of POCAML. This proposal is also in line with international best practices requiring FIUs to be able to take proportional and dissuasive sanctions for non-compliance. When the FRC recently began taking actions against reporting institutions for non-compliance with POCAML, it was noted that the Act did not vest on the FRC sufficient powers to take action against errant persons. There is therefore need to enhance the powers of the FRC to enable it to take civil and administrative action against non-compliant persons and institutions.

The FRC has benchmarked with other FIUs in the region and beyond and notes that these FIUs are clothed with these powers.

However, when the Amendment Bill was published, certain elements of the administrative sanctions were omitted. The proposed amendments therefore seek to revert the amendments in the Bill to the form as originally proposed by the FRC.

New proposal within clause 24C

“(2) Before taking administrative action imposing against any person or reporting institution under this section, the Centre shall give not less than fourteen days’ notice in writing, requiring the person or reporting institution to show cause as to why the prescribed administrative action should not be taken.

Justification

Affords fair hearing to a reporting institution before issuing sanctions. The sanctions imposed are of a serious nature. However, there appears to be no provision for conducting a hearing with the reporting institution before imposing sanctions. This may be seen to be a breach of the right to natural justice and could result in administrative action against the FRC.

Clause 8

That clause 8 is amended by deleting paragraph (c) and substituting therefor with the following new paragraph:

“(c) taking all decisions of the Centre in the exercise, discharge and performance of the Centre’s objectives, powers, functions and duties”.

Justification

This clarifies that the Director-General is responsible for all decisions of the Centre. This is in line with the Financial Action Task Force (FATF) requirements and international best practice where the Centre is required to be operationally independent

Clause 11

That clause 11 be amended in 31(3) by inserting the words “specific act or” immediately before the word “function”

Justification

- (a) The amendment seeks to remove the role of the State Corporations Act over the operations of the Centre as this has the potential to interfere with the operational independence of the centre which is a key requirement and best practice for financial intelligence units;

- (b) The Cabinet Secretary, however, retains the role of approving the general terms and conditions of the Centre's staff.

E. The Uwezo Fund Bill, 2015

The Cabinet Secretary informed the Committee that the Government has initiated of consolidating most of the Funds established to one Fund. This will reduce their administration costs, avoid duplicity and ensure efficiency. Therefore the Uwezo Fund Bill should be passed. The Committee Concurred.

F. Public Private Partnership (Amendment) Bill, 2016

The CS proposed the following further amendments to the Public Private Partnership (Amendment) 2016

Section in Act	Clause in Bill	Issue	Proposed Amendment
2	-	<p>Definition of "transaction advisor" includes the term 'accession' which is not used anywhere in the Act. Its meaning is unclear in actual legal practice, and introduces uncertainty on what is intended. We believe this was a drafting error.</p> <p>It also provides a limited scope for the transaction advisor's services, which in any event is a substantive matter better left to the primary section – section 36 of the Act.</p>	<p>It is proposed that the word "accession" in the definition of the term 'transaction advisor' be deleted.</p> <p>It is also proposed that the words "including the preparation, accession and conclusion of a project agreement and the financial close" be deleted from the definition, so that the definition of the term "transaction advisor" would now read as follows:</p> <p><i>"transaction advisor" means a person appointed in writing by a contracting authority who has the appropriate skill and experience to assist and advise the contracting authority or the unit on matters related to a public private partnership;</i></p>
36	-	<p>There are a number of issues surrounding the transaction advisory services in a PPP project development –</p> <ol style="list-style-type: none"> 1. First, the capacity of a contracting authority may be wanting in the entire 	<p>It is recommended that section 36(1) be amended by inclusion of the words 'preparation, procurement, contract negotiation and management so that the new sub-</p>

Section in Act	Clause in Bill	Issue	Proposed Amendment
		<p>PPP project value chain: preparation, development, procurement, contract negotiation, and even contract management.</p> <p>2. Secondly, the scope of an advisor's engagement under this section needs to be expanded to include preparation (which is feasibility studies), procurement (which includes preparation of tender documents, support with bidder queries, support with tender evaluations, and support with contract negotiations post-procurement). This will ensure that any contracting authority that engages a transaction advisor will be properly guided on such an advisor's terms of reference.</p> <p>3. Thirdly, contracting authorities need assistance in structuring a transaction advisory procurement framework and contract, and need the technical support and guidance of the Unit. In several instances where contracting authorities have done this on their own, they have experienced very poorly developed projects, that have all ended up in trouble during procurement, or are failing to close at negotiation. The solution is to create a role for the technical support of the Unit to be provided to contracting authorities in the recruitment and management of transaction advisors.</p>	<p>section now reads –</p> <p><i>“36. (1) The unit shall assess the technical expertise of the contracting authority to procure the development, preparation, procurement, contract negotiation and management of a project under this Act.”</i></p> <p>To address the second problem, it is recommended that section 36(2) be amended by deletion of the words “procurement process” appearing at the end thereof, and substituting therefor the words “preparation, procurement, contract negotiations, and financial close phase of a project”.</p> <p>To address the third problem, it is recommended that the following words be introduced, after the word ‘appoint’ appearing in the fourth line of section 36(2): “...with the guidance and approval of the unit...”</p> <p>The new section 36(2) will now read as follows –</p> <p><i>“36. (2) Where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall appoint, with the guidance and approval of the unit, a transaction advisor to assist the authority in the preparation, procurement, contract negotiations, and financial close phase of a project.”</i></p>

Section in Act	Clause in Bill	Issue	Proposed Amendment
56	-	<p>Clause 11 of the PPP (Amendment) Bill, 2016 has removed Cabinet from the procurement process, by making the PPP Committee decision final – which is the correct position in practice. Section 56 retains reference to Cabinet decision under section 54(3) which has been deleted by clause 11. It is necessary to carry through the amendment philosophy from section 54 into sections 56 and 57, by deleting reference to the words “Cabinet” and “Parliament” and substituting therefor the word “Committee”.</p> <p>It is also important to note that the import of section 55, which requires Parliament to ratify a natural resource PPP agreement, in practice is a post-contracting activity: in other words, until a contract is executed, it is not a contract capable of statutory ratification. This means that Parliament can only receive as competent an agreement under section 55 if it has been signed. What would usually happen is that one of the contract conditions would be that it would become effective only upon the ratification.</p>	<p>It is recommended that section 56(1), (2) and (3) be amended by substituting the word ‘Committee’ for the words “Cabinet and “Parliament” together with all words incidental to the two terms as used in these contexts, so that the new section 56 reads as follows –</p> <p>“56. (1) The Committee shall, within a period of thirty days from the date of its decision approving the project and financial risk assessment report, inform the contracting authority of the decision.”</p> <p>(2) Where the Committee approves the undertaking of a project, the contracting authority shall finalise the project agreement for execution by the parties to the project.</p> <p>(3) The contracting authority shall communicate the decision of the Committee in writing, to all bidders who participated in the bidding of the project.”</p>
57	-	<p>As a consequence of clause 11 of the PPP (Amendment) Bill, 2016, reference in section 57 to Cabinet and to Parliament is erroneous, and it is necessary to effect a consequential amendment to this section to make reference to the Committee. This is consistent with the amendment proposed for section 56 of the principal Act.</p>	<p>It is recommended that the words “where the Cabinet approves or Parliament ratifies the undertaking of a project as a public private partnership under this Act,” be deleted, and the following words be substituted therefor –</p> <p>“..., following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government</p>

Section in Act	Clause in Bill	Issue	Proposed Amendment
			<p>contracts,..."</p> <p>So that the new section 57 properly reads as follows:</p> <p><i>"57. The contracting authority shall, following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government contracts, execute the contract awarded to that bidder."</i></p>

G. The County Industrial Development Bill, 2015 – Senate Bill

After the presentation from the Parliamentary Budget Office that the County Industrial Development Bill, 2016 had been certified as money Bill by the Budget and Appropriations Committee and therefore ought not to have originated from the Senate, the Committee concurred with the Budget and Appropriations Committee in rejecting enactment of the law on the basis of its origin. Processing it when it has already been rejected by the Budget and Appropriations Committee would be engaging in an exercise in futility.

MIN.NO. DCF/285 /2016: ADJOURNMENT

The Vice Chairperson adjourned the meeting at 12.05pm

Signed.....

Chairperson

Date.....